

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\*\*\*\*\*

<b>IN THE MATTER OF CHANGE</b>	)	
<b>APPLICATION NO. 43D-30001641 BY</b>	)	<b>FINAL ORDER</b>
<b>JULIUS L. PILATI</b>	)	

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on August 1, 2007, in Billings, Montana, to determine whether Application to Change a Water Right No. 43D-30001641 by Julius L. Pilati should be approved under the criteria set forth in Mont. Code Ann. § 85-2-402.

**APPEARANCES**

Applicant Julius L. Pilati appeared at the hearing *pro se*. Paul Pilati testified on behalf of applicant Julius L. Pilati. Objector Larry Luloff appeared *pro se*. Ed Draper testified on behalf of objector Larry Luloff.

**EXHIBITS**

Applicant offered and the Hearing Examiner admitted the following exhibits at the hearing:

**Applicant's Exhibit JP-1** is a copy of a plat showing the ownership of land in the vicinity of the application and marked to show the location of a headgate on Bull Creek.

The Hearing Examiner held the record open for the sole purpose of receiving a deed documenting a transaction between applicant Julius L. Pilati and Charles A. and Margene R. Hall. Said deed was subsequently received by the Hearing Examiner and has been included in the record.

**FINDINGS OF FACT**

**General**

1. Application to Change Water Right No. 30001641 in the name of Julius L. Pilati was filed with the Department on April 10, 2002. (Department File)

2. Application to Change a Water Right No. 43D-30001641 proposes to change the place of use and points of diversion of Water Right Statement of Claim Nos. 43D-492400 and 43D-216273. The General Abstracts for these Statements of Claim describes them right as a decreed rights with a priority date of July 1, 1891. (Department File, Abstract of Claim Nos. 43D-492400 and 43D-216273)
3. Statement of Claim Nos. 43D-492400 and 43D-216273 are supplemental which means the rights have overlapping places of use. The existing place of use for these two rights are identical and are listed as 9 acres in the NESE Sec. 28, 11 acres in the N2SE Sec. 28, and 9 acres in the SWSE Sec. 28, T6S, R20E, all in Carbon County, Montana for a total of 29 acres. The existing points of diversion for these two claims however are different. Statement of Claim 43D-492400 lists a point of diversion in the SWSWNE Sec. 33, T6S, R20E, and Statement of Claim 43D-216273 lists a point of diversion in the NESE Sec. 28, T6S, R20E. Statement of Claim No. 43D-492400 lists a maximum flow rate as decreed by the Water Court in Basin 43D of 1.5 cfs without listing a specific volume. Statement of Claim No. 43D-216273 lists a maximum flow rate as decreed by the Water Court in Basin 43D of 1.0 cfs without listing a specific volume. Both General Abstracts of these Statements of Claim indicate the Water Court statement that “the total volume of this water right shall not exceed the amount put to historical and beneficial use.” (Department File, Abstracts of Claims No. 43D-492400 and 43D-216273)
4. Application to Change a Water Right No. 43D-30001641 proposes to change the place of use and the point of diversion of 2.0 cfs up to 36 acre feet of water under Statement of Claims Nos. 43D-492400 and 43D-216273. If approved, the new point of diversion for both Statements of Claim will be located in the NWSESE Sec. 21, T6S, R20E. The Application to Change states that 17 acres will be taken out of irrigation in the N2SE Sec. 28, T6S, R20E, and the water previously dedicated to that acreage will be used for irrigation on 9 acres in the W2SENE Sec. 21, T6S, R20E. (Application, Department File)
5. The Environmental Assessment (EA) prepared by the Department for this Change Application was reviewed and is included in the record of this

proceeding. The EA concludes that no significant environmental impacts were identified and that no EIS is required. (Department File)

6. A public notice describing facts pertinent to this Change Application was published in the *Carbon County News*, a newspaper of general circulation, printed and published on December 23, 2004, and was mailed to persons listed in the Department file on December 17, 2004. (Department File)

### **Historical Use**

7. The abstract of claim for Statement of Claim No. 43D-492400 lists a maximum flow rate of 1.5 cfs for the purpose of irrigation on 29 acres in the SE Sec. 28, T6S, R20E (more particularly described above) from Bull Creek with a period of diversion from May 1 to October 31. The Statement of Claim states that the maximum volume of this water right "shall not exceed the amount put to historical beneficial use." Statement of Claim No. 43D-492400 is a supplemental claim with Statement of Claim No. 43D-216273. (Abstract of Claim No. 43D-492400)
8. The abstract of claim for Statement of Claim No. 43D-216273 lists a maximum flow rate of 1.0 cfs for the purpose of irrigation on 29 acres in the SE Sec. 28, T6S, R20E (more particularly described above) from Bull Creek with a period of diversion from May 1 to October 31. The Statement of Claim as decreed by the Water Court in the temporary preliminary decree states that the maximum volume of this water right "shall not exceed the amount put to historical and beneficial use." Statement of Claim No. 43D-216273 is a supplemental claim with Statement of Claim No. 43D-492400. (Abstract of Claim No. 43D-216273)
9. Applicant states that there will be "no more water use than historically" and that "this water was used in the early days for hay & grass production." (Supplement to Application)
10. Paul Pilati asserts that these water rights have always been "used since 91." (Hearing Record at 22:44)
11. There is no evidence in the record describing or estimating the volume of water put to actual historic beneficial use. (Department File, Hearing Record)

### **Adverse Effect**

12. Applicant has not identified if there are any water users between the historic point of diversion and the proposed point of diversion or between the historic

place of use and the proposed place of use. Applicant has not identified any water users above the historic place of use or below the proposed place of use. (Application File, Hearing Record)

13. Applicant states that “this change will not hinder anyone else” and “benefits the water use for neighbors below me and also the fish.” (Supplement to Application)
14. Applicant states that 17 acres will be taken out of irrigation in the N2SE Sec. 28, T6S, R20E, and the water previously used on that acreage will now be used to the north on 9 acres in the W2SWNE Sec. 21, T6S, R20E. The Statements of Claim for these water rights indicate a place of use consisting of 29 acres in the SE Sec. 28, T6S, R20E. No mention is made of what use, if any, will occur on the balance of 12 acres (29 minus 17) remaining in the SE Sec. 28. (Application, Supplement to Application)
15. The record does not contain any description or analysis of the actual historic use (of either diverted volume or consumptive use) of Statement of Claim No. 43D-197636. (Department File, Hearing Record)

#### **Means of Diversion**

16. Applicant proposes to cease using water previously diverted through a headgate and ditch off Bull Creek and then subsequently divert that water through a headgate and ditch downstream off Willow Creek. (Application, Hearing Record)
17. The record does not describe the size or capacity of the headgate or ditch proposed to be used for irrigation at the new place of use. (Department File, Hearing Record)

#### **Beneficial Use**

18. Applicant proposes to utilize 2.0 cfs up to 36 acre feet to irrigate 9 acres in the W2SENE Sec. 21, T6S, R20E. (Application, Supplement to Application)
19. The use of water for irrigation is a beneficial use. (MCA § 85-2-102(2))

#### **Possessory Interest**

20. Applicant has provided deeds demonstrating his possessory interest in the W2SENE Sec. 21, T6S, R20E. (Department File)

## **CONCLUSIONS OF LAW**

### **General**

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in Mont. Code Ann. § 85-2-402. For the instant application the requirements of Mont. Code Ann. § 85-2-402(2)(e,f,g) are not applicable because the proposed change does not involve salvage water and no water quality objections were received. (Finding of Fact 2, Department File)
2. Montana Code Annotated § 85-2-402(2) states, inter alia, and as applicable to the instant application:

Except as provided in subsections (4) through (6), (15), and (16), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of the evidence that the following criteria are met:

  - a. The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
  - b. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
  - c. The proposed use of water is a beneficial use.
  - d. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.
3. The public notice requirement of Mont. Code Ann. § 85-2-307 has been met. (Finding of Fact 6)

### **Adverse Effect**

4. Applicant has not proven by a preponderance of the evidence that there will be no adverse affect the use of existing water rights of other persons. In an application for a change in a water right, there must be some evidence of the actual historic use made of the water right.

The applicant in a change proceeding in Montana must prove the historic

beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, Final Order, (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order, (1992). Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, , 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402.

*In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation - Final Decision.*

In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or

indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

Montana's change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser

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1. Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

2. When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

quantity because of the relatively limited actual historic use of the right.  
(italics added).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)(“*A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator's crops. Carriage losses are usually added to the amount consumed by the crops.*”); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d



1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land

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and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....  
When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....  
Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

## 2 Water and Water Rights at § 14.04(c)(1).

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation

proceeding before the Department under Mont. Code Ann. § 85-2-402.

In the instant case the only evidence of historic use are the abstracts of claims and the naked assertion by the Applicant and his witness the there will be “no more water use than historically” that “this water was used in the early days for hay & grass production” and that these water rights have always been “used since 91.” There is no indication of the volumes of water historically used for irrigation. (Finding of Fact Nos. 7 – 11)

“Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation water rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, (1989) conclusion of law No. 8. Applicant has not introduced sufficient evidence to determine annual volume historically consumed under either right. In addition, it is unclear from the record how the acres remaining at the old place of use will be able to continue to be irrigated without expanding the historic use of the water right. (Finding of Fact No. 14, 15) Indeed, it is unclear from the record how the 17 acres “being removed from irrigation” at the old place of use will, in fact, be actually retired from irrigation. Without some evidence of the volume of water actually historically used for irrigation it is impossible for the Hearing Examiner to determine whether this proposed change will result in an expansion of the water right(s).

5. Applicant has not identified any other water users in the vicinity of the proposed change that may be adversely affected should the change be granted. Applicant only makes vague generalizations that there will be no impact on other water users or that the proposed change will be beneficial to other users and other resource values. (Finding of Fact Nos. 12, 13) The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. *Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston*, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991). Mont. Code Ann § 85-2-

402 (2) provides that the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the proposed change will not “adversely affect the use of the existing water rights of other persons.”

By a preponderance of the evidence is meant such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it.

*Ekwortzel v. Parker* 156 Mont. 477, 484-485, 482 P.2d 559, 563 (1971) (quoting with approval District Court’s Jury Instruction No. 2) (emphasis added)

The Applicant in the instant matter, having not even identified other water users who may be affected either near the old point of diversion or place of use nor the new point of diversion and place of use, has failed to clear the evidentiary hurdle necessary for the Department to determine that the change application will not adversely affect the use of the existing water rights of other persons. Applicant has not proven by a preponderance of the evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons.

### **Means of Diversion**

5. Applicant has not described the new proposed means of diversion other than to state that he plans to divert the water through a headgate downstream of the existing point of diversion and convey the water down a ditch off of Willow Creek. (Finding of Fact No. 15) In *In the Matter of Application for Beneficial Water Use Permit No. 10,046-s41D by John P. Schonenberger* the Department determined that the applicant’s “proposed means of diversion will be adequate” based on the applicant’s representation that he “would build in accordance with [Soil and Conservation Service] plans and specifications. On appeal, the District Court found:

2. DNR's decision was in violation of statutory provisions and in excess of its statutory authority. Although DNR has statutory authority to require modification of a diversion's plans and specifications as a condition to issuance of a permit (*citation omitted*) DNR has absolutely no authority to issue any permit without prior review of the adequacy of the means of diversion. By issuance of a permit without any proof of the adequacy of the means of diversion, DNR violated the statutory condition precedent to the issuance of a permit: namely a showing that "the proposed means of diversion or construction are adequate." Sec. 85-2-311, MCA.
3. DNR followed an unlawful procedure during the course of its decision to grant Schonenberger's application. When DNR approved the application without first requiring any evidence of the adequacy of the means of diversion or its construction, the [objectors] herein were effectively denied their rights of cross-examination and rebuttal on the issue.

*Jack Hirschy Livestock, Inc. v. Schonenberger and DNRC*, Cause No. 9163 Amended Order, District Court of the Fifth Judicial District, County of Beaverhead (1979)

The Hearing Examiner in this instant matter recognizes that *Schonenberger* was an application for a new beneficial use and that the instant matter is for a change in appropriation, but an examination of the applicable statutes reveals that the requirement that "the proposed means of diversion, construction, and operation of the appropriation works are adequate" is identical in both the requirements for a new appropriation and for a change in appropriation. (MCA 85-2-311(1)(c), MCA 85-2-402(2)(b)) Applicant has failed to clear the evidentiary hurdle necessary for the Department to determine if the means of diversion, construction, and operation of the appropriation works are adequate. Applicant has not proven by a preponderance of the evidence that the means of diversion, construction, and operation of the appropriation works are adequate. (Finding of Fact No. 16, 17)

### **Beneficial Use**

6. Applicants proposal to utilize the water under this change authorization for irrigation is a recognized beneficial use. Applicant has proven by a preponderance of the evidence that the proposed use is a beneficial use. (Finding of Fact Nos. 18, 19)

### **Possessory Interest**

7. Applicant has proven by a preponderance of the evidence that he has a possessory interest in the property where the water is to be put to beneficial use. (Finding of Fact 20)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusion of Law, the Hearing Examiner makes the following:

### **FINAL ORDER**

Application to Change a Water Right No. 43D-30001641 by Julius L. Pilati is **DENIED**.

### **NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 30<sup>th</sup> day of May, 2008.

/Original signed by David A. Vogler/

David A. Vogler  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601

### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of FINAL ORDER was served upon all parties listed below on this 30<sup>th</sup> May, 2008 by first-class United States mail.

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LARRY D LULOFF  
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Cc:  
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/Original signed by Jamie Price/  
Jamie Price, Hearings Assistant  
Hearings Unit, (406) 444-6615